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No. 03-778

IN THE

Supreme Court of the United States

SAUL F. ROSENTHAL AND THE ANTI-DEFAMATION LEAGUE,

Petitioners,

v.

WILLIAM QUIGLEY AND DOROTHY QUIGLEY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* OF THE AMERICAN JEWISH COMMITTEE, THE AMERICAN JEWISH CONGRESS, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, THE ASIAN LAW CAUCUS, BET TZEDEK, THE HUMAN RIGHTS CAMPAIGN, THE JEWISH COUNCIL FOR PUBLIC AFFAIRS, LAMBDA LEGAL DEFENSE AND EDUCATION FUND, THE NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, THE NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES, NOW LEGAL DEFENSE AND EDUCATION FUND, PUBLIC COUNSEL, THE SOUTHERN POVERTY LAW CENTER, AND THE VIOLENCE POLICY CENTER IN SUPPORT OF PETITIONERS AND BRIEF AMICI CURIAE

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The American Jewish Committee, The American Jewish Congress, Americans United for Separation of Church and State, The Asian Law Caucus, Bet Tzedek, The Human Rights Campaign, The Jewish Council for Public Affairs, Lambda Legal Defense and Education Fund, The National Asian Pacific American Legal Consortium, The National Association for the Advancement of Colored People, The National Partnership for Women and Families, NOW Legal Defense and Education Fund, Public Counsel, The Southern Poverty Law Center, and The Violence Policy Center ("*amici*") hereby move, pursuant to S. Ct. R. 37.2, for leave to file a brief *amicus curiae* in support of the petition for a writ of *certiorari* to the United States Court of Appeals for the Tenth Circuit. Although Petitioners the Anti-Defamation League ("ADL") and Saul F. Rosenthal have consented to the filing of this *amicus* brief, Respondents William and Dorothy Quigley have refused their consent. A copy of the proposed brief is attached.

As more fully explained at pages one through seven of the attached *amicus* brief under "Interest of Amici Curiae," *amici* have a significant interest in the outcome of this litigation because they are public interest organizations, like the ADL, that use speech about issues of public concern to advance their core missions. The rule announced by the Tenth Circuit in this case threatens to stifle the speech of these groups by imposing liability for speech traditionally afforded protection under the First Amendment.

Accordingly, *Amici* respectfully request that the Court grant leave to file the attached brief *amicus curiae.*

Respectfully submitted,

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TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Interest of Amici Curiae	1
Summary of Argument	7
Certiorari Should Be Granted To Clarify When Speech Is Of "Public Concern" And To Resolve The Conflicts Between The Tenth Circuit's Decision And Rulings By This Court And Other Circuits	9
A. The Speech in this Case Clearly Involved a Matter of Public Concern	9
B. The Panel's Narrow Definition of Matters of Public Concern Raises Important Issues and Conflicts with Prior Decisions of this Court and those of Other Circuits	11
C. The Public Concern Doctrine and the Actual Malice Standard Insure that the Proper Balance is Struck Between Protected Speech and Liability for the Dissemination of False Information	14
Conclusion	16

TABLE OF CITED AUTHORITIES

CASES *Page*

Associated Press v. Walker, 338 U.S. 130 (1967) .. 11

Bartnicki v. Vopper, 532 U.S. 514 (2001) 8, 9

Brasslett v. Cota, 761 F.2d 827 (1st Cir. 1985) 12, 13

Brenner v. Brown, 36 F.3d 18 (7th Cir. 1994) 13

Connick v. Myers, 461 U.S. 138 (1983) 8, 9, 13

Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) 11

Dalbec v. Gentleman's Companion, Inc., 828 F.2d 921 (2d Cir. 1987) 15

Denton v. Morgan, 136 F.3d 1038 (5th Cir. 1998) 12, 13

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) 8, 11

Flamm v. American Association of University Women, 201 F.3d 144 (2d Cir. 2000) 12, 13

Gertz v. Welch, 418 U.S. 323 (1974) 11, 12

Johnson v. Multnomah County, 48 F.3d 420 (9th Cir. 1995) 13

Cited Authorities

Page

Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978) 10

New York Times v. Sullivan, 376 U.S. 254 (1964) 7, 14, 15

Quigley v. Anti-Defamation League and Saul Rosenthal, 327 F.3d 1004 (10th Cir. 2003) ...8, 10, 12

Sheetz v. The Morning Call, 946 F.2d 202 (3d Cir. 1991) 10

Straw v. Chase Revel, Inc., 813 F.2d 356 (1987) .. 15

United States v. Thomas Lamar Bean, 537 U.S. 71 (2003) 7

Victor v. Mc Elveen, 150 F.3d 451 (5th Cir. 1998) .. 12

Wulf v. City of Wichita, 883 F.3d 842 (10th Cir. 1989) 13

United States Constitution:

First Amendment ..... *passim*

INTEREST OF AMICI CURIAE

This case involves the constitutionality of a very large damage award imposed against a national civil rights organization. *Amici curiae* are also national organizations that are deeply concerned about the effects of such liability on freedom of association and freedom of speech protected by the First Amendment.[1]

The American Jewish Committee ("AJC"), a national organization of over 125,000 members and supporters with 33 regional offices, was founded in 1906 to protect the civil and religious rights of Jews. AJC joins in this amicus brief because, as a public interest institution, AJC is concerned that the imposition of liability on such institutions for the unratified conduct of volunteer members and that a narrow definition of what constitutes a matter of public concern will have a significant chilling effect on their activities to the detriment of our society.

The American Jewish Congress is an organization of American Jews founded in 1912 to protect the civil, political, and economic rights of American Jews. Like the ADL, it has a regional structure and relies heavily on volunteers. The issues in this case are therefore not merely of academic concern to the American Jewish Congress.

Americans United for Separation of Church and State is a national, nonsectarian public interest organization based in Washington, D.C. that is committed to preserving the

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1. This brief has been authored in its entirety by undersigned counsel for the *amici curiae*. No person or entity, other than the named *amici* and their counsel, made any monetary contribution to the preparation and submission of this brief.

constitutional principle of separation of church and state. Since its founding in 1947, Americans United has participated as a party or amicus in numerous cases before the U.S. Supreme Court, federal courts of appeals, and state supreme courts. Americans United is comprised of more than 75,000 members nationwide and maintains an active chapter in the State of Colorado. The advocacy and legal work of Americans United is aided by numerous volunteers, including volunteer attorneys, across the country.

The Asian Law Caucus is a nonprofit, public interest legal organization whose mission is to promote, advance, and represent the civil rights of Asian-Pacific Islander communities. Founded in 1972, the ALC is the nation's oldest Asian-Pacific Islander civil rights legal organization. The ALC has provided legal services and community education of affirmative action and discrimination, represented individuals in discrimination suits, and conducted legal and regional policy advocacy on affirmative action.

Bet Tzedek, "The House of Justice," is a non-profit legal services agency that, since 1974, has been providing free and compassionate legal services to thousands of low-income residents throughout Southern California. Bet Tzedek provides these services to clients of all racial, religious and ethnic backgrounds. Bet Tzedek relies heavily upon a network of volunteer attorneys, paralegals and others to serve its clients, and shares the concerns of other *amici* regarding the impact of the Court of Appeals' decision in this case.

The Human Rights Campaign ("HRC") is the nation's largest gay and lesbian civil rights organization, with over 400,000 members and volunteers nationwide. HRC is devoted to fighting and ending discrimination on the basis

of sexual orientation, and to protecting the basic civil and human rights of gay, lesbian, and bisexual Americans. To this end, HRC provides federal and state legislative, regulatory and judicial advocacy, and media and grass roots support on a range of issues and initiatives affecting gay, lesbian and bisexual individuals.

The Jewish Council for Public Affairs (JCPA), formerly the National Jewish Community Relations Advisory Council, is an umbrella organization of 13 national and 122 local Jewish public affairs and community relations agencies. Founded in 1944, JCPA is committed to the dual mission of safeguarding the rights of Jews in the United States and abroad and promoting a just society for all Americans.

Lambda Legal Defense and Education Fund is the country's oldest and largest legal organization dedicated to advancing the civil rights of lesbians, gay men, bisexuals, the transgendered, and people with HIV or AIDS, and has often appeared before this Court. Lambda Legal's work includes litigation, policy advocacy, and public education efforts on matters of significant public concern, including harassment of minorities, religious freedom and rights of free speech.

Lambda Legal often takes positions that are initially unpopular but, over time, take root in the broader society. Lambda Legal joins this *amicus* brief because the decision below threatens the vital contributions of public interest organizations to public debate on important issues of the day and is contrary to core First Amendment principles.

The National Asian Pacific American Legal Consortium (NAPALC) is a national non-profit, non-partisan

organization whose mission is to advance the legal and civil rights of Asian Pacific Americans. Since 1994, NAPALC, with the assistance of its Affiliates, has published an annual report called the Audit of Violence Against Asian Pacific Americans. NAPALC uses community education, advocacy and technical assistance to combat hate crimes. NAPALC has an interest in the current case because its outcome has a bearing on all public interest organizations who seek pro bono legal assistance for victims of hate crimes.

The National Association for the Advancement of Colored People ("NAACP") is a non-profit membership corporation, chartered by the State of New York, tracing its root to 1909. The NAACP has in excess of 500,000 members and over 2,200 units in the United States and overseas. As the nation's oldest and largest civil rights organization, its principal aims and objectives are clearly set forth in its Constitution as follows: To insure the political educational, social and economic equality of minority group citizens of the United States; to remove all barriers of racial discrimination through democratic processes; *to seek enactment and enforcement of federal, state and local laws securing civil rights*; to inform the public of the adverse effects of racial discrimination and to seek elimination; to educate persons as to their constitutional rights and *to take all lawful action to secure the exercise thereof, and, to take any other lawful action in furtherance of these objectives* consistent with the Articles of Incorporation.

The NAACP has used the legislature and the courts, among others, as primary instruments in its struggle to make real the rights that the Constitution provides for those within the borders of the United States.

In regard to the First Amendment right to freedom of speech and freedom of association, the NAACP has litigated significant cases in the more distant past and continues to do so in the present.

The National Partnership for Women and Families, founded in 1971, formerly known as the Women's Legal Defense Fund, is a national advocacy organization that develops and promotes public policies to help women achieve equal opportunity, quality health care, and economic security for themselves and their families. The National Partnership has a longstanding commitment to equal opportunity for women and to monitoring the enforcement of antidiscrimination laws. The National Partnership has devoted significant resources to combating sex and race discrimination and has filed numerous briefs *amicus curiae* in the federal circuit courts of appeal to advance women's opportunities.

NOW Legal Defense and Education Fund is a leading national non-profit civil rights organization that has used the power of the law to define women's rights for over 30 years. NOW Legal Defense frequently appears as counsel and as amicus in federal and state courts nationwide on behalf of individuals who have experienced sex discrimination. As a public interest law firm, NOW Legal Defense frequently relies on volunteer attorneys to assist in these efforts. Accordingly, we are very concerned about the implications for our work of the Court of Appeals' decision to uphold a result that jeopardizes free expression and contravenes core First Amendment values.

Public Counsel is the nation's largest public interest pro bono law firm. Established in 1970, Public Counsel is

dedicated to advancing equal justice under law by delivering free legal services to indigent and under-represented children and adults throughout Los Angeles County, ensuring that other community-based organizations serving this population have legal support, and mobilizing the pro bono resources of the community's attorneys and law students. With help from over 20,000 volunteers, Public Counsel has assisted hundreds of thousands of clients and delivered over a quarter of a billion dollars worth of free legal services to the poor. Public Counsel frequently advances its goals through public advocacy on behalf of clients, both in the media and before governmental bodies. Public Counsel is concerned that holding public interest organizations liable for defamation and subjecting them to large punitive damage awards based on their advocacy, without requiring proof of actual malice, will seriously chill these organizations in the exercise of their First Amendment rights.

The Southern Poverty Law Center ("The Center"), founded in 1971, is a nationally recognized leader in the area of civil rights litigation. The Center has litigated numerous pioneering civil rights cases on behalf of women, minorities, factory workers, poor people in need of health care, mentally ill persons, children in foster care, prisoners facing barbaric conditions of confinement and many other victims of injustice. The Center has litigated and won six landmark civil rights lawsuits before this Court.

The Violence Policy Center ("VPC") is a national nonprofit organization working to reduce firearms violence through research, education and advocacy. The Violence Policy Center is at the forefront of organizations working to reduce firearms violence in our nation. To this end, VPC analyzes a wide range of current firearms issues and provides

information to policymakers, journalists, scholars, public health professionals, grassroots advocates, and members of the general public. Of particular relevance to this case, the Violence Policy Center's Litigation Project initiates and participates in litigation in support of its mission. With a staff of one, the Violence Policy Center's Litigation Project, established in March 2001, relies heavily on representation by pro bono counsel. For example, the Violence Policy Center was represented by pro bono counsel in *Violence Policy Center v. Ashcroft*, No. 1:01CV01209 (D.D.C. 2001), in which the VPC was a plaintiff, and in *United States v. Thomas Lamar Bean*, 537 U.S. 71 (2003) in which the Violence Policy Center participated as *amicus*.

SUMMARY OF ARGUMENT

This case presents profoundly important questions concerning the constitutionality of a large punitive damages award against a public interest organization. In *New York Times v. Sullivan*, 376 U.S. 254 (1964), this Court recognized that civil judgments, like criminal prosecutions, can chill and prevent speech. The Court declared: "What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. The fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute." *Id.* at 277.

But stifled speech is precisely what will result from the opinion of the United States Court of Appeals for the Tenth Circuit, over the dissent of Judge Hartz, which upheld a $10.5 million judgment against a national civil rights organization, the Anti-Defamation League (ADL). Supreme Court review in this case is important because this case raises several important issues, including what constitutes speech

of "public concern." The Tenth Circuit emphasized that the speech at issue was not of "public concern" in large part because it was subsequently found to be false. *Quigley v. Anti-Defamation League and Saul Rosenthal*, 327 F.3d 1044, 1059-1062 (10th Cir. 2003). The Tenth Circuit's analysis, however, confuses the issue of whether a statement is of public concern with distinct inquiries as to the identity of the parties and the truth of the statements. This Court should grant review because the Tenth Circuit's decision conflicts with prior decisions of this Court and deepens a conflict among the circuits concerning the determination of whether speech involves a matter of public concern.

The question of what constitutes a matter of public concern arises in many areas of First Amendment law under tests articulated by this Court. *See, e.g.*, *Bartnicki v. Vopper*, 532 U.S. 514 (2001) (no liability for the media for broadcasting a tape of an illegally intercepted and recorded call because it involved a matter of public concern and because the media did not participate in the illegality); *Connick v. Myers*, 461 U.S. 138 (1983) (the First Amendment protects speech by government employees only if it involves a matter of public concern); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (defamation liability turning on whether a matter is of public concern). Because there are myriad circumstances in which the issue presents itself, this Court should grant certiorari to clarify a question that frequently arises in litigation and which has created great uncertainty: how are courts to determine if speech involves a matter of public concern?

Amici public interest organizations submit this brief in support of *certiorari* because of the potentially devastating effects the Tenth Circuit's decision could have if it is not overturned. If the verdict in this case is not reviewed by this

Court (and is not subsequently reversed), it will have an enormous chilling effect on the expressive activities of public advocacy groups that have historically been afforded First Amendment protection. Indeed, liability for such expression strikes at the very heart of the First Amendment.

CERTIORARI SHOULD BE GRANTED TO CLARIFY WHEN SPEECH IS OF "PUBLIC CONCERN" AND TO RESOLVE THE CONFLICTS BETWEEN THE TENTH CIRCUIT'S DECISION AND RULINGS BY THIS COURT AND OTHER CIRCUITS

A. The Speech in this Case Clearly Involved a Matter of Public Concern

The Tenth Circuit upheld the large punitive damage award returned by the jury in this case on the ground that statements regarding a federal lawsuit about bigotry, anti-Semitism, and potentially criminal conduct were not of general public concern. Although this Court has not provided a clear definition of "matters of public concern," it has indicated that this phrase refers to matters of legitimate interest to the public. *See, e.g.*, *Bartnicki*, 532 U.S. at 534 (denying liability because labor-management negotiations for schools are of interest to the public and thus a matter of public concern). In *Connick v. Myers*, 461 U.S. at 146, this Court explained that "speech touches a matter of public concern [when] . . . it can be fairly considered as relating to any matter of political, social, or other concern to the community."

The speech here certainly touched upon a matter of public importance. The statements by appellant Saul Rosenthal that were the basis for the defamation and false light liability concerned the lawsuit that the Aronsons had filed against

the Quigleys in federal court. The Wiretap Act liability arose from the speech set forth in the complaint itself. The suit alleged that the Quigleys had deprived the Aronsons of their constitutional rights based on their race and religion.

The statements that were the basis for liability related to harassment based on race and religion, a topic of obvious great social significance. As Judge Hartz powerfully observed in his dissent: "I would have thought that *the* social concern of our day is bigotry. Surely faith-based intolerance, particularly when combined with threats of violence, is a matter of concern to the community at large." *Quigley*, 327 F.3d at 1076 (emphasis in original).

Moreover, there is no doubt that comments about a pending lawsuit, particularly one regarding allegations of discrimination based on race and religion, should be deemed to be matters of public concern. As this Court has previously noted, "[t]he operation of the courts . . . [is a matter] of the utmost public concern." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 839 (1978). Furthermore, the Aronsons and Quigleys each had made reports to the local police concerning each other's conduct, and courts have found that "when police are called, a private disturbance loses much of its private nature." *Sheetz v. The Morning Call*, 946 F.2d 202, 207 (3d Cir. 1991).

B. The Panel's Narrow Definition of Matters of Public Concern Raises Important Issues and Conflicts with Prior Decisions of this Court and those of Other Circuits

The Tenth Circuit held that to be of public concern the speech at issue had to have been true or the speaker must not have been negligent in failing to discover its falsity.[2] This holding conflates very distinct questions: Is the speech true? Is the necessary mental state for liability present? Is the matter of public concern? No decision of this Court ever has held that the determination of the latter is based on, or even influenced by, the other questions.

The panel's approach is at odds with decisions of this Court holding that there are different standards for liability for defamation depending upon whether statements pertain to matters of public concern. *See, e.g., Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-59 (1985) (articulating the importance of the inquiry as to whether speech is of public concern in defamation actions). If the panel's approach were left intact and followed, then no statement in any defamation case ever could be deemed to

2. The Tenth Circuit also held that speech cannot be a matter of public concern if it occurs between private parties. This holding also gives rise to an issue worthy of *certiorari*. No court has ever held that speech is of public concern only if it pertains to public entities or private businesses whose conduct affects the public. Quite the contrary, this Court often has ruled that speech about individuals can be of public concern. *See Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967) (statements about a football coach were of public concern); *Associated Press v. Walker*, 338 U.S. 130 (1967) (statements about alleged racist activities of former army general were of public concern); *Gertz v. Welch*, 418 U.S. 323 (1974) (statements about a lawyer's conduct were of public concern).

be of "public concern" because defamatory speech, by definition, is false. Judge Hartz expressed this fundamental point well in his dissent: "If only true statements could be matters of public concern, Colorado's public concern doctrine would be an empty gesture, because true statements can *never* be the basis for a defamation cause of action." *Quigley*, 327 F.3d at 1075 (emphasis in original). *See also Gertz v. Welch*, 418 U.S. at 333 n.4 ("It would undermine the rule [requiring proof of knowing or reckless falsity] to permit the factual falsity of a statement to determine whether or not its publisher is entitled to the benefit of the rule.")

Moreover, there is a split among the circuits concerning whether recklessly false statements can be deemed a matter of public concern. Contrary to the Tenth Circuit's approach, several circuits have held that the falsity of the statement is a distinct issue from whether it is a matter of public concern. The Fifth Circuit, for example, has declared that "the accuracy of the speech . . . [does not] play[] a role in determining whether the expression involves a matter of public concern." *Denton v. Morgan*, 136 F.3d 1038, 1043 (5th Cir. 1998); *see also Victor v. McElveen*, 150 F.3d 451, 456-57 (5th Cir. 1998). The First Circuit likewise has held that "the mere fact that statements were erroneous does not remove them from the Constitution's protection. . . . To deny protections to false statements negligently made would chill discourse altogether." *Brasslett v. Cota*, 761 F.2d 827, 844 (1st Cir. 1985).

Similarly, the Second Circuit, in a case involving facts similar to this matter, found that the accuracy of the statement is a distinct issue from whether it involves a matter of public concern. *Flamm v. American Association of University Women*, 201 F.3d 144 (2d Cir. 2000), involved a suit against

a public interest organization for statements it made concerning gender discrimination. The court found that the statements involved matters of public concern even if they were false. *Id.* at 150.

The Ninth Circuit has expressly recognized the conflict among the circuits on this issue, noting that the "Circuits appear to be split on whether, in light of *Connick*, recklessly false statements are *per se* unprotected by the First Amendment." *Johnson v. Multnomah County*, 48 F.3d 420, 423 (9th Cir. 1995). *Compare Denton v. Morgan*, 136 F.3d 1038, 1043 (5th Cir. 1998); *Brasslett v. Cota*, 761 F.2d 827, 841 (1st Cir. 1985); *Flamm v. American Association of University Women,* 201 F.3d 144 (2d Cir. 2000); *with Wulf v. City of Wichita*, 883 F.2d 842, 859 n.24 (10th Cir. 1989) ("[p]resumably, the issue of the truth or falsity of the statements at issue is relevant to both the threshold public concern analysis and the balancing required under *Pickering*. It is difficult to see how a maliciously or recklessly false statement could be viewed as addressing a matter of public concern."); *Brenner v. Brown*, 36 F.3d 18, 20 (7th Cir. 1994) (cited by the Ninth Circuit in *Johnson* as creating a circuit split; noting that "even if the speech . . . involved a matter of public concern, an employee's speech is not protected where it is made with a reckless disregard for the truth").

The Tenth Circuit's opinion in this case will create a chilling effect on the manner in which public interest groups advance their causes. Many of the most critical public concerns of our day are discussed and understood primarily through the lens of the experiences of otherwise private individuals. Race, gender, and faith-based discrimination, abortion, child abuse, police misconduct, and health care, for example, are given importance in the public debate

because of their impact on the lives of individuals. Public interest groups, including *amici*, rely on people, such as the Aronsons, to come forward and make public their personal experiences. Although not every allegation advanced by an aggrieved person ultimately will be determined to be legally actionable or factually true, the underlying issues may be issues of public concern that are entitled to First Amendment protection. Speech about such events, and particularly about litigation concerning such events, is an important avenue through which public interest groups like *amici* advance their causes.

This Court should grant certiorari to resolve the important conflict among the circuits and clarify the standard for determining whether a statement involves a matter of public concern.

C. The Public Concern Doctrine and the Actual Malice Standard Insure that the Proper Balance is Struck Between Protected Speech and Liability for the Dissemination of False Information

The opinion of the Tenth Circuit replaces the actual malice standard articulated by this Court in *New York Times v. Sullivan*, 376 U.S. 254 (1964), for imposing punitive damages with an inquiry concerning only whether the statements were ultimately found to be false. That is, the conflating of two separate issues—the authenticity of the statement and the status of the statement as one of public concern—will result in the obliteration of the actual malice standard for determining the propriety of imposing punitive damages. Once the statement is found to be false and therefore necessarily found not to be one of public concern, punitive damages can be imposed without a finding of actual

malice. The injustice of that result is underscored in this case, where the jury returned an $8.5 million punitive damages award against a public interest organization, whose core mission includes exposing allegations of discrimination to public scrutiny, for merely disseminating information about pending litigation.

To meet the standard of actual malice, the defendant must have known that the allegedly defamatory material was false, or published it with a reckless disregard of whether it was false. *New York Times v. Sullivan*, 376 U.S. at 280; *Straw v. Chase Revel, Inc.*, 813 F.2d 356 (1987); *Dalbec v. Gentleman's Companion, Inc.*, 828 F.2d 921 (2d Cir. 1987) ("A finding of malice must be based on clear and convincing evidence that 'the defendant in fact entertained serious doubts as to the truth of his publication,' or, in the alternative, know if its falsity."). The actual malice standard insures the award of punitive damages only under certain clearly defined circumstances and dissolves any concern that an individual or group might seek to take advantage of the protection afforded by the public concern doctrine. To the extent the public concern doctrine might create an opportunity either for the attack of another's character or for the dissemination of false information with impunity, the actual malice standard creates a zone of protection for the victim of a defamatory statement and simultaneously insures that the publisher of a false statement on a matter of public concern is punished for wrongdoing only if it is purposeful.

The actual malice standard thus not only punishes the author of the defamatory statement commensurate with his culpability—thereby serving as an effective tool in preventing purposeful defamation—but also preserves the special nature of punitive damages, which historically have been awarded

only in narrow and well-defined circumstances in order to punish the wrongdoer for culpable conduct. The panel opinion ignores the special nature of punitive damages, particularly in defamation cases where, as here, constitutional restraints on such damages may be present, and permits their imposition in this case without the necessary showing of actual malice.

CONCLUSION

Amici are deeply concerned about the effects large damage awards can have on their activities. The Tenth Circuit's approach to defining what constitutes matters of public concern will expose public interest organizations, such as *amici*, to a serious risk of significant liability for their speech activities in conflict with protections historically afforded these organizations by the First Amendment. For these reasons, *amici* urge this Court to grant certiorari and clarify this significant issue of First Amendment law.

Respectfully submitted,

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